

AMENDED IN SENATE APRIL 29, 1998

AMENDED IN SENATE APRIL 2, 1998

**SENATE BILL**

**No. 1521**

**Introduced by Senator Alpert**

February 10, 1998

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An act to amend Sections 25548.1, ~~25548.4~~, and 25548.5 of the Health and Safety Code, relating to hazardous materials liability.

LEGISLATIVE COUNSEL'S DIGEST

SB 1521, as amended, Alpert. Liability: lenders: fiduciaries.

(1) Existing law exempts from liability a person who is acting in the capacity of a lender under any state or local statute, regulation, or ordinance, to the extent that the statute, regulation, or ordinance requires the taking of a removal and remedial action, or the payment of a penalty, and the liability arises from a release or threatened release of hazardous material at, from, or in connection with certain property, or to the extent the statute, regulation, or ordinance authorizes damages arising from a release or threatened release at certain property, except as specified. This exemption applies only if specified conditions exist, including if the lender maintains indicia of ownership in the property primarily to protect a security interest. ~~Existing law defines the term "primarily to protect a security interest" as meaning that the indicia of ownership of a lender are held primarily for the purpose of securing payment or performance of an obligation;~~

~~but excludes certain indicia of ownership held primarily for investment purposes or indicia of ownership held primarily for purposes other than as protection for a security interest.~~

~~This bill would revise the definition of the term “primarily to protect a security interest,” to specify that any authorized or permitted activity of a supervised financial institution, except as specified, is an activity primarily to protect a security interest, loan, or obligation~~ *various terms for purposes of these immunity provisions.*

(2) Existing law provides that ~~these immunity provisions do not, among other things, exempt or excuse a lender or fiduciary who operates or directs the operation, or maintains the operation, of the property from compliance with the operational requirements of applicable laws, and specifies that operational requirements include certain permitting, reporting, monitoring, emission limitation, corrective action, financial responsibility and assurance requirements.~~

~~This bill would revise the activities included within the term “operational requirements” to instead include activities initiated or continued following completion of a remedial or removal action, including specified activities that are deemed necessary by the agency that approved the final remedial action plan, as specified.~~

(3) Existing law provides that the immunity specified in (1) above, does not apply if ~~the lender, by an act or failure to act caused or contributed to the release or threatened release of the hazardous material or if, among other things, the fiduciary receives benefits that exceed customary or reasonable compensation for the administration of the property or if the lender made, secured, held, or acquired the loan or obligation primarily for investment purposes.~~

~~This bill would revise those exclusions from the immunity provided to lenders, as specified to instead provide that it does not apply if the benefits the fiduciary receives exceed customary and reasonable compensation or if the lender made, secured, held, or acquired a security interest for those reasons.~~

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. Section 25548.1 of the Health and Safety Code is amended to read:

25548.1. As used in this chapter, the following terms have the following meaning:

(a) “Actual benefit” means the amount, if any, realized by the lender upon the disposition of property acquired through foreclosure or its equivalent as a direct result of a removal or remedial action undertaken by another person, not to exceed the amount, if any, by which the disposition proceeds exceed the sum of the balance of all of the following:

(1) The loan or obligation or the amount of the lien, evidenced by the loan or obligation outstanding at foreclosure or its equivalent.

(2) The costs, including attorneys’ fees, incurred by the lender in connection with the foreclosure or its equivalent, subsequent ownership, any removal or remedial action, and disposition of the property.

(b) “Borrower, debtor or obligor” means a person who is obligated to a lender under a loan or obligation, whether or not the lender maintains a security interest in that person’s property.

(c) “Damages” includes compensatory damages, exemplary damages, punitive damages, and costs of every kind and nature, including, but not limited to, costs of a removal or remedial action.

(d) “Fiduciary” means a person who is acting in any of the following capacities:

(1) As trustee for a trust described in paragraph (1) or (2) of subdivision (a) of Section 82 of the Probate Code.

(2) As a fiduciary in any arrangement described in paragraphs (1) to (3), inclusive, or paragraphs (5) to (14), inclusive, of subdivision (b) of Section 82 of the Probate Code.

(3) A trustee appointed in proceedings under any state or federal bankruptcy law.

(4) An assignee or a trustee acting under an assignment made for the benefit of creditors.

1 (5) A court-appointed receiver.

2 (e) “Finance lease” means a transaction with respect  
3 to which both of the following apply:

4 (1) The lessor does not select or manufacture the  
5 goods or does not supply the goods, except in the case of  
6 a re-lease, whether it is created by a new transaction or  
7 substitution of the lessee.

8 (2) The lessor acquires the goods or right to possession  
9 and use of the goods in connection with the lease or a  
10 prior lease transaction.

11 (f) “Foreclosure or its equivalent” means the  
12 acquisition of property by a lender through any of the  
13 following:

14 (1) Judicial or nonjudicial foreclosure of the lender’s  
15 security interest in the property or acceptance of a deed  
16 or other conveyance in satisfaction thereto.

17 (2) Acceptance of a deed in lieu or other conveyance  
18 in satisfaction of a loan or obligation previously  
19 contracted.

20 (3) Termination of a finance lease by consent or  
21 default.

22 (4) Any other formal or informal manner, whether  
23 pursuant to law or under warranties, covenants,  
24 conditions, representations or promises from the  
25 borrower, by which the lender acquires, for subsequent  
26 disposition, actual possession of the property subject to a  
27 security interest.

28 (g) “Hazardous material” has the same meaning as  
29 defined in subdivision (d) of Section 25260.

30 (h) (1) “Indicia of ownership” means evidence of a  
31 security interest, evidence of an interest in a security  
32 interest, or evidence of an interest in real or personal  
33 property securing a loan or other obligation, including,  
34 but not limited to, any legal or equitable title to real or  
35 personal property acquired incident to foreclosure or its  
36 equivalent.

37 (2) “Evidence of an interest” includes, but is not  
38 limited to, all of the following:

39 (A) Mortgages.

40 (B) Deeds of trust.

1 (C) Liens.

2 (D) Surety bonds and guarantees of obligations.

3 (E) Title held pursuant to a finance lease in which the  
4 lessor does not select initially the leased property.

5 (F) Legal or equitable title obtained pursuant to  
6 foreclosure or its equivalent.

7 (G) Assignments, pledges, or other rights to, or other  
8 forms of, encumbrance against property that are held  
9 primarily to protect a security interest.

10 (3) A person is not required to hold title or a security  
11 interest to maintain indicia of ownership.

12 (i) “Lender” means a person to the extent of the  
13 capacity in which that person maintains indicia of  
14 ownership primarily to protect a security interest or  
15 makes, acquires, renews, modifies, or holds a loan or  
16 obligation from a borrower. “Lender” includes either of  
17 the following persons:

18 (1) Any person who acts as, or on behalf of, a lender in  
19 connection with any aspect of the solicitation,  
20 negotiation, consummation, disbursement,  
21 administration, servicing, collection, enforcement, or  
22 foreclosure or its equivalent of a loan or obligation or  
23 security interest in property ~~including, but not limited to,~~  
24 *such as* a surety, escrow, or title ~~insurer~~ company.

25 (2) Any person who makes, secures, acquires, or holds  
26 a loan or obligation or security interest by assignment,  
27 sale, pledge, subrogation, succession, or operation of law,  
28 or becomes the receiver for the holder of a loan or  
29 obligation or security interest.

30 (j) “Loan or obligation” means a loan, revolving or  
31 nonrevolving line of credit, finance lease, sale-leaseback  
32 that provides for a purchase option in favor of the lessee,  
33 installment sale contract, sale on account, or other credit  
34 sale, letter of credit, forbearance or guaranty, collateral  
35 pledge, or other suretyship obligation, and any extension,  
36 renewal, or modification thereof. A loan or obligation  
37 may or may not involve a security interest in property.

38 (k) (1) Except as provided in paragraphs (3) and (4),  
39 “participate (or participation) in the management of the  
40 property” means actual participation in the management

1 or operational affairs of the property by the lender while  
2 the borrower, under the loan or obligation, is in possession  
3 of the property, and the lender exercises decisionmaking  
4 control over the environmental compliance by the  
5 borrower, so that the lender assumes responsibility for the  
6 hazardous material handling or disposal practices of the  
7 borrower, or exercises control at a level comparable to  
8 that of a manager of the enterprise of the borrower, so  
9 that the lender assumes or manifests responsibility for the  
10 overall management of the enterprise encompassing the  
11 day-to-day decisionmaking of the enterprise with respect  
12 to either of the following:

13 (A) Environmental compliance.

14 (B) All, or substantially all, of the operational, as  
15 opposed to financial or administrative, aspects of the  
16 enterprise other than environmental compliance.

17 (2) For purposes of paragraph (1), the following terms  
18 have the following meaning:

19 (A) “Operational aspects of the enterprise” includes,  
20 but is not limited to, functions such as that of facility or  
21 plant manager, operations manager, chief operating  
22 officer, or chief executive officer.

23 (B) “Financial or administrative aspects” includes,  
24 but is not limited to, functions such as that of a credit  
25 manager, accounts payable/receivable manager,  
26 personnel manager, controller, or chief financial officer.

27 (3) Notwithstanding paragraph (1), “participation in  
28 the management of the property” does not include an act  
29 or omission by a prospective lender prior to making,  
30 acquiring, or holding a loan or obligation. “Participation  
31 in the management of the property” also does not include  
32 the actions taken by a prospective lender who undertakes  
33 or requires an environmental inspection of property  
34 prior to making, acquiring, or holding a loan or obligation.  
35 A lender or prospective lender does not “participate in  
36 the management of the property” if the lender or  
37 prospective lender requires the borrower to clean up the  
38 property or requires the borrower to comply or come into  
39 compliance with any applicable law or regulation. This  
40 chapter does not require a lender to conduct or require



1 an inspection prior to foreclosure or its equivalent to  
2 qualify for the exemption provided by this chapter, and  
3 the liability of a lender shall not be based on or affected  
4 by whether the lender conducts or requires an inspection  
5 prior to foreclosure or its equivalent.

6 (4) Loan policing and work out activities, as specified  
7 in paragraphs (5) and (6), that are consistent with  
8 holding ownership indicia primarily to protect a security  
9 interest and consistent with a loan or obligation made,  
10 acquired, or held primarily for purposes other than  
11 investment purposes, do not constitute participation in  
12 the management of the property. The authority for the  
13 lender to take those actions may, but are not required to,  
14 be contained in contractual or other documents  
15 specifying requirements for financial, environmental,  
16 and other warranties, covenants, conditions,  
17 representations, or promises from the borrower. Loan  
18 policing and work out activities include all activities up to  
19 foreclosure or its equivalent.

20 (5) A lender who engages in loan policing activities  
21 prior to foreclosure or its equivalent is exempt from  
22 liability pursuant to this chapter if the lender does not, by  
23 those actions, participate in the management of the  
24 property. Those actions include, but are not limited to, all  
25 of the following:

26 (A) Requiring the borrower to conduct a removal or  
27 remedial action during the term of the security interest  
28 or loan or obligation.

29 (B) Requiring the borrower to comply or come into  
30 compliance with applicable federal, state, and local  
31 environmental and other laws during the term of the  
32 security interest or loan or obligation.

33 (C) Securing or exercising authority to monitor or  
34 inspect the property, including onsite inspections, or the  
35 business or financial condition of the borrower during the  
36 term of the security interest or loan or obligation.

37 (D) Taking other actions to adequately police the  
38 loan, obligation, or security interest, such as requiring the  
39 borrower to comply with any warranties, covenants,

1 conditions, representations, or promises in connection  
2 with the security interest or loan or obligation.

3 (6) (A) A lender who engages in work out activities  
4 prior to foreclosure or its equivalents is exempt from  
5 liability pursuant to this chapter if the lender does not, by  
6 those actions, participate in the management of the  
7 property.

8 (B) “Work out” means those actions by which a  
9 lender, at any time prior to foreclosure or its equivalent,  
10 seeks to prevent, cure, or mitigate a default by the  
11 borrower, or to preserve or prevent the diminution of the  
12 value of the property, security interest, or loan or  
13 obligation.

14 (C) Work out activities include, but are not limited to,  
15 all of the following:

16 (i) Restructuring or renegotiating the terms of the  
17 loan, obligation, or security interest.

18 (ii) Requiring payment of additional rent or interest.

19 (iii) Exercising rights pursuant to an assignment of  
20 accounts or other amounts owing to a lender.

21 (iv) Requiring or exercising rights pursuant to an  
22 escrow agreement pertaining to amounts owing to a  
23 lender.

24 (v) Exercising forbearance.

25 (vi) Providing specific or general financial or other  
26 advice, suggestions, counseling, or guidance.

27 (vii) Exercising any right or remedy the lender is  
28 entitled to by law or under any warranties, covenants,  
29 conditions, representations, or promises from the  
30 borrower.

31 (7) A lender does not participate in the management  
32 of the property by taking any response action under  
33 Section 107(d)(1) of the Comprehensive Environmental  
34 Response, Compensation and Liability Act of 1980 (42  
35 U.S.C. Sec. 9607(d)(1)). However, the lender may be  
36 liable for damages, as defined by this chapter, that occur  
37 as a result of the gross negligence or willful misconduct  
38 of the lender in his or her performance of a response  
39 action under Section 107 (d)(1) of the Comprehensive



1 Environmental Response, Compensation and Liability  
2 Act of 1980 (42 U.S.C. Sec. 9607(d)(1)).

3 (l) “Person” means any entity, including, but not  
4 limited to, an individual, estate, trust, firm, business trust,  
5 joint stock company, corporation, partnership, joint  
6 venture, limited liability company, association, or  
7 government. “Person” includes, but is not limited to, any  
8 city, county, district, the state, or the federal government,  
9 or any department, subdivision, or agency thereof.

10 ~~(m) “Primarily to protect a security interest, loan, or~~  
11 ~~obligation”~~

12 (m) (1) “*Primarily to protect a security interest*”  
13 means that the indicia of ownership of a lender are held  
14 primarily for the purpose of securing payment or  
15 performance of an obligation.

16 ~~(1) “Primarily to protect a security interest, loan, or~~  
17 ~~obligation”~~

18 (2) “*Primarily to protect a security interest*” does not  
19 include indicia of ownership held primarily for  
20 investment purposes or indicia of ownership held  
21 primarily for purposes other than as protection for a  
22 security interest, ~~loan, or obligation~~. A lender may have  
23 other, secondary reasons for maintaining indicia of  
24 ownership, but the primary reason that any indicia of  
25 ownership are held shall be as protection for a security  
26 interest, ~~loan, or obligation~~.

27 ~~(2) An “authorized or permitted activity” of a~~  
28 ~~supervised financial institution, except those activities~~  
29 ~~permitted in subdivision (d) of Section 751.3 of the~~  
30 ~~Financial Code or Section 7350 of the Financial Code, is~~  
31 ~~an activity primarily to protect a security interest, loan,~~  
32 ~~or obligation.~~

33 (n) “Property” means any real or personal property  
34 where hazardous materials are or were generated,  
35 handled, managed, deposited, stored, disposed of, placed,  
36 released, or otherwise have come to be located. In the  
37 context of a loan or obligation, “property” includes any  
38 real or personal property in which the obligor has or had  
39 an ownership, leasehold, or possessory interest, whether

1 or not it was the subject of a security interest for the loan  
2 or obligation.

3 (o) “Release” has the same meaning as defined in  
4 Section 25320.

5 (p) “Remedial action” has the same meaning as  
6 defined in subdivision (g) of Section 25260.

7 (q) “Removal” means the cleanup or removal of  
8 released hazardous materials from the environment or  
9 the taking of other actions that may be necessary to  
10 prevent, minimize, or mitigate damages that may  
11 otherwise result from a release or threatened release, as  
12 further defined in Section 101(23) of the Comprehensive  
13 Environmental Response, Compensation and Liability  
14 Act of 1980 (42 U.S.C. Sec. 9601(23)).

15 (r) “Security interest” means an interest in a property  
16 created or established for the purpose of securing a loan  
17 or obligation. Security interests include, but are not  
18 limited to, mortgages, deeds of trust, liens, and title  
19 pursuant to a finance lease. Security interests may also  
20 arise from transactions such as sale and leasebacks,  
21 conditional sales, installment sales, trust receipt  
22 transactions, certain assignments, factoring agreements,  
23 and accounts receivable financing arrangements and  
24 consignments if the transaction creates or establishes an  
25 interest in a property for the purpose of securing a loan  
26 or other obligation.

27 ~~SEC. 2. Section 25548.4 of the Health and Safety Code~~  
28 ~~is amended to read:~~

29 ~~25548.4. This chapter does not do any of the following:~~

30 ~~(a) Affect any rights, defenses, or immunities that are~~  
31 ~~available to any lender or fiduciary under any applicable~~  
32 ~~law.~~

33 ~~(b) Create any liability for any lender or fiduciary.~~

34 ~~(c) Create any private right of action against any~~  
35 ~~lender or fiduciary.~~

36 ~~(d) (1) Exempt or excuse a lender or fiduciary who~~  
37 ~~operates or directs the operation, or maintains the~~  
38 ~~operation, of the property from compliance with the~~  
39 ~~operational requirements of applicable laws relating to~~  
40 ~~activities conducted subsequent to completion of a~~

1 ~~remedial or removal action of hazardous materials from~~  
2 ~~that property.~~

3 ~~(2) For purposes of this subdivision, operational~~  
4 ~~requirements also include those activities initiated or~~  
5 ~~continued following completion of a remedial or removal~~  
6 ~~action of hazardous materials from the property that are~~  
7 ~~deemed necessary by the agency that approved the final~~  
8 ~~remedial action plan to protect the public health and~~  
9 ~~environment and achieve or maintain the abatement~~  
10 ~~goals established by the final remedial action plan.~~

11 ~~(e) Affect any liability of a fiduciary to a beneficiary of~~  
12 ~~a fiduciary estate for breach of trust under Chapter 4~~  
13 ~~(commencing with Section 16400) of Part 4 of Division 9~~  
14 ~~of the Probate Code.~~

15 ~~(f) Affect any liabilities of a fiduciary estate.~~

16 ~~(g) Exempt a lender from liability imposed by~~  
17 ~~Chapter 6.8 (commencing with Section 25300) for a~~  
18 ~~removal or remedial action or the recovery of damages~~  
19 ~~relating to a release or threatened release of hazardous~~  
20 ~~material, to the extent that the lender is a responsible~~  
21 ~~party pursuant to Section 107(a)(3) or (4) of the~~  
22 ~~Comprehensive Environmental Response Compensation~~  
23 ~~and Liability Act of 1980 (42 U.S.C. Sec. 9607(a)(3) or~~  
24 ~~(4)).~~

25 ~~(h) Exempt a lender or fiduciary from any liability~~  
26 ~~imposed by Chapter 6.5 (commencing with Section~~  
27 ~~25100).~~

28 ~~(i) Exempt or excuse a lender from liability under any~~  
29 ~~state or local statute, regulation, or ordinance for a known~~  
30 ~~or suspected release or known or suspected threatened~~  
31 ~~release of hazardous materials caused by events or~~  
32 ~~conditions occurring prior to foreclosure or its equivalent,~~  
33 ~~unless, after taking possession of the property, the lender~~  
34 ~~promptly takes each of the following actions in~~  
35 ~~accordance with applicable law:~~

36 ~~(1) Suspends operations with respect to that portion of~~  
37 ~~the property where the known or suspected release or~~  
38 ~~known or suspected threatened release occurred or may~~  
39 ~~occur.~~

~~(2) Removes from the suspended operations and affected areas on the property, all hazardous material not released into the environment and secures the suspended operations.~~

~~(3) Reports any known or suspected releases of hazardous material.~~

~~(j) Limit the application or enforcement of Section 25359.4 or 25359.5 or other state or local fencing, posting, securing, notification, or reporting laws with regard to property that is acquired by a lender through foreclosure or its equivalent, to the extent that those requirements are otherwise applicable to the property.~~

~~(k) Exempt a lender from compliance with an administrative order requiring immediate and temporary measures to prevent, abate, or minimize an emergency caused by a release or threatened release of hazardous material at, from, or in connection with, any property that has been acquired by the lender through foreclosure or its equivalent, when all of the following circumstances exist:~~

~~(1) The release or threatened release presents an imminent and substantial endangerment to the public health or welfare or the environment.~~

~~(2) No other person who is viable and potentially responsible for the release or threatened release has been identified and located by the agency issuing the order, following a reasonable effort by the agency to identify and locate any such person.~~

~~(3) The costs and expenses incurred by the lender to comply with the administrative order do not exceed twenty-five thousand dollars (\$25,000).~~

~~(4) If the lender complies with the administrative order, the compliance would not, in and of itself, subject the lender to liability for a removal or remedial action or damages, fines, penalties, impositions, or assessments relating to the release or threatened release under any federal law.~~

~~(l) (1) Exempt a lender who has acquired title to property through foreclosure or its equivalent from operation and maintenance requirements that were~~

1 established on the property as a result of a removal or  
2 remedial action conducted on the property.

3 (2) “Operation and maintenance requirements”  
4 include, but are not limited to, deed restrictions and  
5 requirements to maintain passive exposure controls and  
6 to perform monitoring. If there are requirements other  
7 than operation and maintenance requirements, which  
8 are applicable to the property to maintain the  
9 effectiveness of the removal or remediation action, the  
10 lender shall comply with those requirements unless the  
11 lender, upon foreclosure or its equivalent, notifies the  
12 appropriate agency that it does not intend to comply with  
13 the requirements and the agency concurs.

14 (m) Require a lender to conduct, or require a lender  
15 to direct the taking of, an inspection of the property after  
16 foreclosure or its equivalent to qualify for the exemption  
17 provided by this chapter, and the liability of a lender shall  
18 not be based on, or affected by, the lender not  
19 conducting, or not requiring, an inspection of the  
20 property after foreclosure or its equivalent.

21 (n) Require a fiduciary to conduct or require an  
22 inspection of the property in a fiduciary estate to qualify  
23 for the exemption provided by this chapter and the  
24 liability of the fiduciary shall not be based on, or affected  
25 by, the fiduciary not conducting or not requiring an  
26 inspection prior to holding the property as part of the  
27 fiduciary estate.

28 **SEC. 3.—**

29 *SEC. 2.* Section 25548.5 of the Health and Safety Code  
30 is amended to read:

31 25548.5. The exemptions set forth in Sections 25548.2  
32 and 25548.3 shall not apply under any of the following  
33 conditions:

34 (a) If, after foreclosure or its equivalent is conducted,  
35 the lender does not undertake to sell, re-lease property  
36 held pursuant to a finance lease, whether by a new  
37 finance lease or by substitution of the lessee, or otherwise  
38 undertake to be divested of the property in a reasonably  
39 expeditious manner, using whatever commercially  
40 reasonable means are relevant or appropriate with

1 respect to the property, taking all facts and circumstances  
2 into consideration. For purposes of establishing that a  
3 lender is seeking to sell, re-lease property held pursuant  
4 to a finance lease, whether by a new finance lease or  
5 substitution of the lessee, or be divested of property in a  
6 reasonably expeditious manner, the lender may use  
7 whatever commercially reasonable means as are relevant  
8 or appropriate with respect to the property, or may  
9 employ the following means:

10 (1) For purposes of this subdivision, the exemption set  
11 forth in subdivision (a) of Section 25548.2 shall apply  
12 following foreclosure or its equivalent, if, within 12  
13 months following foreclosure or its equivalent, the lender  
14 does either of the following:

15 (A) Lists the property for sale, re-lease, or other  
16 disposition with a broker, dealer, or agent who deals with  
17 that type of property.

18 (B) Advertises the property for sale, re-lease, or other  
19 disposition on at least a monthly basis in either of the  
20 following:

21 (i) A real estate publication or trade or other  
22 publication suitable for advertising the property.

23 (ii) A newspaper of general circulation, which is a  
24 newspaper with a circulation over 10,000 or one suitable  
25 under any applicable federal, state, or local rules of court  
26 for publication required by court order or rules of civil  
27 procedure, covering the area where the property is  
28 located.

29 (2) For purposes of this subdivision, the 12-month  
30 period shall begin to run from the date that the lender  
31 acquires marketable title to the property if the lender,  
32 after the expiration of any redemption or other waiting  
33 period provided by law, has acted diligently to acquire  
34 marketable title. If the lender has failed to act diligently  
35 to acquire marketable title, the 12-month period shall  
36 begin to run on the date of foreclosure or its equivalent.

37 (b) If, after foreclosure or its equivalent, the lender  
38 does not comply with all applicable statutes, regulations,  
39 or ordinances that require the disclosure of information  
40 or conditions regarding the property to any person.

1 (c) If the fiduciary's negligent or intentional or  
2 reckless conduct causes or contributes to the release or  
3 threatened release of a hazardous material at, from, or in  
4 connection with a property held by the fiduciary as part  
5 of the fiduciary estate.

6 (d) With respect to liability that arises from a  
7 voluntary removal or remedial action taken by a fiduciary  
8 if, prior to initiating a voluntary removal or remedial  
9 action, the fiduciary does not notify the appropriate  
10 agency of the fiduciary's intent to conduct that action.

11 (e) With respect to liability that arises from conduct of,  
12 or ownership of the property by, the lender or fiduciary,  
13 other than in its capacity as a lender or fiduciary.

14 (f) Where the loan or obligation or fiduciary  
15 relationship or fiduciary transaction is structured for the  
16 purpose of evading liability for a release or threatened  
17 release of hazardous materials.

18 (g) If the fiduciary is both a beneficiary and fiduciary  
19 with respect to the same fiduciary estate, or as a fiduciary,  
20 receives benefits that exceed customary and reasonable  
21 compensation for the administration of the property  
22 permitted under other applicable law.

23 (h) To the extent of the actual benefit, if any, realized  
24 by a lender upon the disposition of property acquired  
25 through foreclosure or its equivalent as a result of a  
26 removal or remedial action undertaken by another  
27 person.

28 (i) If the lender participated in the management of  
29 the property before foreclosure or its equivalent, except  
30 that the lender's liability shall be limited to any release or  
31 threatened release which occurred while the lender  
32 participated in the management of the property.

33 ~~(j) If the lender, acted contrary to, or failed to take~~  
34 ~~action otherwise affirmatively required by, the~~  
35 ~~applicable law governing hazardous materials.~~

36 ~~(k) If the lender did not make, secure, hold, or acquire~~  
37 ~~the security interest, loan, or obligation primarily to~~  
38 ~~protect a security interest, loan, or obligation.~~

1 (j) *If the lender, by an act or failure to act, caused or*  
2 *contributed to the release or threatened release of the*  
3 *hazardous material.*

4 (k) *If the lender made, secured, held, or acquired the*  
5 *security interest primarily for investment purposes.*

6 (l) If the lender outbids, rejects, or fails to act upon an  
7 offer of fair consideration for the property acquired  
8 through foreclosure or its equivalent, unless the lender is  
9 required, to avoid liability under federal or state law, to  
10 make a higher bid, to obtain a higher offer, or to seek or  
11 obtain an offer in a different manner. For purposes of this  
12 subdivision, the following terms shall have the following  
13 meaning:

14 (1) (A) “Fair consideration” means the sum of all of  
15 the following less the amounts specified in subparagraph  
16 (B):

17 (i) The value of the security interest or loan or  
18 obligation calculated as an amount equal to or in excess  
19 of, the sum of the outstanding principal, or comparable  
20 amount in the case of a finance lease, owed to the lender  
21 immediately preceding the acquisition of full title  
22 pursuant to foreclosure or its equivalent.

23 (ii) Any unpaid interest, rent, or penalties, whether  
24 arising before or after foreclosure or its equivalent.

25 (iii) All reasonable and necessary costs, fees, or other  
26 charges incurred by the lender incident to workout,  
27 foreclosure or its equivalent, retention, maintaining the  
28 business activities of the enterprise, preserving,  
29 protecting, and preparing the property prior to sale,  
30 re-leasing the property held pursuant to a finance lease,  
31 whether by a new finance lease or substitution of the  
32 lessee, or other disposition.

33 (iv) The lender’s costs incurred for any removal or  
34 remedial action, including but not limited to, response  
35 costs for response action taken by the lender under  
36 Section 107(d)(1) of the Comprehensive Environmental  
37 Response Compensation and Liability Act of 1980 (42  
38 U.S.C. Sec. 9607(d)(1)).





1 (B) In determining fair consideration, the following  
2 amounts shall be subtracted from the sum calculated  
3 pursuant to subparagraph (A):

4 (i) Any amounts received by the lender in connection  
5 with any partial disposition of the property.

6 (ii) Net revenues received as a result of maintaining  
7 the business activities of the enterprise.

8 (iii) Any amounts paid by the borrower subsequent to  
9 the acquisition of full title pursuant to foreclosure or its  
10 equivalent.

11 (C) In the case of a lender holding a junior security  
12 interest, junior loan, or junior obligation, “fair  
13 consideration” is the value of all outstanding higher  
14 priority security interests, loans or obligations plus the  
15 value of the security interest, loan or obligation held by  
16 the junior holder, calculated as set forth in this paragraph.

17 (2) “Outbids, rejects, or fails to act upon an offer of fair  
18 consideration” means that the lender outbids, rejects, or  
19 fails to act upon within 90 days from the date of receipt  
20 of a written, bona fide and firm offer of fair consideration  
21 for the property received at any time after six months  
22 following foreclosure or its equivalent. That six-month  
23 period shall begin to run from the date that the lender  
24 acquires marketable title, if the lender, after the  
25 expiration of any redemption or other waiting period  
26 provided by law, has acted diligently to acquire  
27 marketable title. If the lender has failed to act diligently  
28 to acquire marketable title, the six-month period shall  
29 begin to run on the date of foreclosure or its equivalent.

30 (3) “Written, bona fide and firm offer” means a legally  
31 enforceable, commercially reasonable, cash offer solely  
32 for the property, including all material terms of the  
33 transaction, from a ready, willing, and able purchaser  
34 who demonstrates to the lender’s satisfaction the ability  
35 to perform.

1	
2	CORRECTIONS
3	Text — Page 9.
4	
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